

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

January 24, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2004-212
Petitioner	:	A.C. No. 29-02170-32227
	:	
v.	:	
	:	
SAN JUAN COAL COMPANY,	:	San Juan South
Respondent	:	

DECISION

Appearances: Michael D. Schoen, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for Petitioner;
Timothy M. Biddle, Esq., Daniel W. Wolff, Esq., Crowell & Moring, LLP, Washington, D.C., for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against San Juan Coal Company, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges three violations of the Secretary’s mandatory health and safety standards and seeks a penalty of \$13,524.00. A trial was held in Farmington, New Mexico. For the reasons set forth below, I modify a citation and an order, affirm the third citation, and assess a penalty of \$10,224.00.

Background

San Juan Coal Company operates the San Juan South Mine, an underground coal mine in Waterflow, New Mexico. The mine operates 24 hours a day, seven days a week, in three ten hour shifts per day. The day shift, 7:00 a.m. to 5:00 p.m., and the afternoon shift, also called the “swing” shift, 4:00 p.m. to 2:00 a.m., are production shifts. The “graveyard” shift, 10:00 p.m. to 8:00 a.m., generally performs maintenance (which explains why it is also known as the “maintenance” shift).

Coal is mined by the longwall method. The longwall miner in the 102 longwall panel, the area under consideration in this case, consists of a double cutting drum shear which is conveyed back and forth across the coal face on a conveyor system, cutting the coal. The coal falls onto a

pan line below the shear and is transported to the headgate to be taken out of the mine. The roof is supported by 176 shields ranging across the longwall face, which measures 1,006 feet. After the shear cuts the coal, the shields automatically advance toward the face, providing continuous support for the newly exposed roof.

Except for the first four shields on each side of the face, which are slightly larger, the shields are five feet wide at the base. As coal is mined, the continuous cutting action of the shear causes coal dust, coal particles and chunks of coal to accumulate on the shields. These accumulations are cleaned off of the shields mainly by the use of high pressure water hoses which are located every ten shields. If the coal is too large to be cleaned off by the water, shovels are used. Of the six man longwall crew, two miners called “propmen” have the primary assignment of cleaning the longwall shields.

MSHA Inspector Donald E. Gibson, the Field Office Supervisor in MSHA’s Aztec, New Mexico, field office, went to the mine on March 22, 2004, to conduct a five day spot inspection.¹ After reviewing the mine records and meeting with management officials, he went underground with Monty Owens, San Juan’s safety representative, and Steve Felkins, the miners’ representative, to inspect the 102 longwall. They arrived at the headgate at about 7:30 a.m., shortly after the beginning of the day shift. The longwall was not in operation because the miners were constructing an isolation stopping.²

Inspector Gibson proceeded across the longwall face. When he arrived in the area of longwall shield 130 he observed that shields 130 through 176 had accumulations of loose coal and coal dust on the jack legs, on the toes of the shields, as well as on the base of the shields and the leminscates. The accumulations measured between 1/8 inch and 10 inches in depth. Based on his observations, Inspector Gibson issued Citation No. 4768527.

After issuing the citation, Inspector Gibson continued his inspection to the tailgate area and the Nos. 2 and 3 return air entries. When he arrived at the No. 3 entry, he noticed that the area next to a check curtain, directing air into the No. 2 entry, was black with float coal dust. He went to the No. 2 entry and observed that both entries were black with float coal dust. The inspector examined along both entries, and noted what he believed to be impermissible float coal dust accumulations from crosscuts one through 22. As a consequence, he issued Order No. 4768528.

Citation No. 4768527 and Order No. 4768528 were contested at the trial. A third violation, set out in Citation No. 7605679, was included in this docket. San Juan stipulated that

¹ Because the mine liberates more than one million cubic feet of methane per day it is subject to a “spot inspection . . . every five working days at irregular intervals.” 30 U.S.C. § 813(i).

² The last time coal had been mined was on the previous day’s afternoon shift.

Citation 7605679 properly alleged a violation of section 75.403 of the regulations, 30 C.F.R. § 75.403, and agreed to pay the assessed penalty of \$324.00 in full. (Tr. 11-12.)

Findings of Fact and Conclusions of Law

Citation No. 4768527

This citation alleges a violation of section 75.400 of the Secretary's regulations, 30 C.F.R. § 75.400, because:

Accumulations of loose coal and fine coal dust w[ere] permitted to accumulate on the shields on the 102 Longwall retreating working section.

The accumulations were on the leminscates, both top and bottom, from shield 130 to shield 176, inclusive. The accumulations were dry.

The accumulations were left from the afternoon shift which stopped mining at 0200 hours 3/22/04.

Several discussions occurred with mine management concerning cleaning off of the shields.

The accumulations ranged from 1/8" to 10" deep.

(Govt. Ex. 10.) Section 75.400 requires that: "Coal dust, including float coal dust deposited on rock dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."³

The Respondent does not deny that the accumulations existed as observed by Inspector Gibson, but maintains that the operator was not given an opportunity to clean them up before the citation was issued. In making this argument, the company focuses on the "shall be cleaned up" language of the regulation. On the other hand, the Secretary, emphasizing "not be permitted to accumulate," asserts that if there is an accumulation, there is a violation. While the facts in some case may require that a line be drawn between the two interpretations, this is not that case. Under either reading, San Juan violated the regulation.

The company argues that the afternoon shift "just ran out of time before they were able to wash down all 176 shields" and that "it was perfectly normal for a subsequent production shift to pick up cleaning where the previous production shift left off." (Resp. Br. at 20.) This argument might have merit if the subsequent production shift began when the previous production shift left

³ This language, with the exception of the words "diesel-powered and," was taken *verbatim* from section 304(a) of the Mine Act, 30 U.S.C. § 864(a).

off, but that is not the case here. Instead, at least five and one half hours elapsed between the time the afternoon shift left the mine and Inspector Gibson issued the citation.

The Commission has long held that the legislative history of the Mine Act “demonstrates Congress’ intention to prevent, not merely to minimize, accumulations. The standard was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated.” *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957 (Dec. 1979). The Commission went on to state that: “We hold that a violation of section 304(a) and 30 C.F.R. § 75.400 occurs when an accumulation of combustible material exists.” *Id.* at 1958. Since there is no dispute that the accumulations on the shields existed, it follows that it was a violation of the regulation.

Furthermore, even if it is inferred that the operator has to be afforded an opportunity to clean up the accumulations, this operator made no attempt to clean the accumulations up within a reasonable time. The maintenance shift apparently made no effort to clean up the accumulations and the day shift had not started to clean them up at the time that the inspector discovered them even though the shift began at 7:00 a.m. As the Commission has stated:

The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be the originating sources of explosions or fires and by also prohibiting the accumulation of those materials that could feed explosions or fires originating elsewhere in a mine.

Black Diamond Coal Mining Co., 7 FMSHRC 1117, 1120 (Aug. 1985). This danger exists as long as the accumulations exist. The danger does not cease to exist when a production shift is followed by a maintenance shift or when the day shift is putting in an isolation stopping. In this case, the operator took no action to clean-up the accumulations for over five hours

Accordingly, I conclude that the company violated section 75.400 as alleged.

Significant and Substantial

The inspector found this violation to be “significant and substantial.” A “significant and substantial” (S&S) violation is described in section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission enumerated four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52

F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of “continued normal mining operations.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4. I have already found a violation of a safety standard. I further find that the accumulations contributed to a distinct safety hazard, i.e. as the originator or feeder of a fire or an explosion. Thus, as is almost always the case, the question of whether the violation is S&S turns on whether the hazard contributed to will result in an injury.

In connection with accumulations, the Commission has held, with regard to the third *Mathies* criterion, that:

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a “confluence of factors” was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990) (“*UP&L*”); *Texasgulf*, 10 FMSHRC at 500-03.

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997).

Inspector Gibson testified that the accumulations were “the worst that I’d seen” in his many inspections of the longwall and the mine. (Tr. 104.) They were extensive, covering up to 46 shields, an area of 230 feet, in deposits up to 10 inches in depth. They were also dry. (Tr. 104.) In addition to the extensiveness of the accumulations, the mine liberates more than one million cubic feet of methane per day. Finally, witnesses testified: (1) that the bits on the shear’s drums caused sparks when striking rocks or metal, such as the sprags on the shields; (2) that there were electrical cables along the face as well as electrical equipment; and (3) that all of these could serve as ignition sources for a fire or explosion. (Tr. 84, 105, 117-18, 213.)

The Respondent argues that since no coal was produced on the maintenance shift, since coal had not been produced on the morning shift when the inspector wrote the citation and since it was the company's normal policy to clean the accumulations on the shield before resuming mining, the Secretary has not established a reasonable likelihood of an ignition. This, however, ignores the length of time the accumulations were present, the fact that maintenance was performed on the longwall during the maintenance shift, which would mean that the electrical equipment was activated in addition to the possibility that whatever tools the maintenance miners were using could be a source of ignition, the fact that with the ignition of methane anywhere in the mine the accumulations could propagate and increase the severity of a fire or explosion, and the fact that continued normal mining practices would involve operation of the shear.

Accordingly, I conclude that the Secretary has established a reasonable likelihood that a fire or explosion involving the accumulations would occur, resulting in an injury. It goes without saying that any injury sustained in a fire or explosion would be a serious one. Therefore, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

This violation was also charged as resulting from the "unwarrantable failure" of the company to comply with the regulation.⁴ The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987); *Youghiogheny*, 9 FMSHRC at 2010. "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (Aug. 1994); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has established several factors as being determinative of whether a violation is unwarrantable, including:

[T]he extent of a violative condition, the length of time it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705,

⁴ The term "unwarrantable failure" is taken from section 104(d)(1) of the Act, which assigns more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992).

Cyprus Emerald Resources Corp., 20 FMSHRC 790, 813 (Aug. 1998).

Some of these factors are present in this case. As already noted, the accumulations were extensive and obvious. They had existed since the end of the afternoon shift, or approximately six hours.⁵ Further, as the company has admitted, no attempts were made to clean-up the accumulations between the time the afternoon shift shut down and the time Inspector Gibson observed them. Nevertheless, taking everything into consideration, I do not find that this violation resulted from the operator's unwarrantable failure.

Based on the company's history of violations, discussions between mine management and Inspector Gibson, and MSHA's "Winter Alert Program," the Secretary argues that the operator had been placed on notice that greater efforts were necessary for compliance in this area. The Secretary's reliance on these factors is misplaced.

According to the operator's Assessed Violation History Report, the company was cited 47 times for violations of section 75.400 between January 2001 and March 2004. (Govt. Ex. 9.) For a mine the size of this one, that does not seem to be a significant number of citations, particularly since, as Inspector Gibson testified, section 75.400 was the most frequently cited section of the regulations, industry-wide, in 2004. (Tr. 136.) For "putting the operator on notice of the necessity for greater efforts at compliance," these citations take on even less importance inasmuch as none of them were for accumulations on the shields. (Tr. 135.) Consequently, I do not find that the company's previous violations should have put it on notice that it needed to make greater efforts to control accumulations on the shields.

The parties stipulated that prior to this violation "San Juan management acknowledges several previous discussions with Inspector Gibson concerning the need to clean the shields of coal dust accumulations." (Tr. 58-59.) David Zabriskie, the afternoon shift longwall supervisor, testified that Inspector Gibson and the other inspectors were always pointing out areas where improvements could be made, but that he did not "consider it a warning as much as I did good advice because of their experience." (Tr. 210.) Similarly, Scott Jones, the General Mine Foreman, said that Inspector Gibson "kind of made comments to me that, you know, you need to watch your cleanup in that area, you need to make sure that you're continually cleaning those shields and keeping them up to standard." (Tr. 335.)

⁵ Inspector Gibson intimated that he believed that the accumulations might have existed for longer than a shift. (Tr. 110.) In view of the fact that almost three quarters of the shields had been cleaned, I find it highly unlikely that the accumulations on the remaining quarter of the shields had been there throughout the whole afternoon shift.

However, to raise a violation to the level of unwarrantable failure, there have to be more than just discussions. As Inspector Gibson testified, he and mine officials had had discussions ever since his first visit to the mine. (Tr. 108.) For the discussions to put the operator on notice that greater efforts at compliance are necessary, they should be admonishments of that effect. General discussions between operators and inspectors occur all the time, but they do not make every violation an unwarrantable failure. As Jones testified, neither Inspector Gibson nor the other inspectors ever told them that their method of cleaning the shields was inadequate or that they needed more miners working on the cleanup. (Tr. 335-36.) Therefore, I do not find that these discussions put the company on notice that greater efforts at compliance were needed.

The last type of notice that the Secretary relies on is MSHA's "Winter Alert Program." Inspector Gibson testified that historically most mine explosions occur between October and March. Accordingly, since the 1970's MSHA has had a "Winter Alert" campaign to remind operators of that fact. He said that in the winter 2003-2004, MSHA was emphasizing "ventilation, examination, permissibility and rock dusting." (Tr. 110.) As with the general discussions, there is no evidence that the company was ignoring the yearly alerts or had a general practice of not properly cleaning up accumulations.

As counsel for the Secretary acknowledged in his opening statement, the Secretary's foundation for claiming that the operator unwarrantably failed to comply with the regulation "is based primarily on the mine's management's notice of the requirements of the Act and a greater need for compliance with the Act." (Tr. 8.) This in turn "was based principally on many conversations that Mr. Gibson and/or other mine inspectors had had with mine management" (Tr. 8-9.) The evidence does not support this claim.

Further, the evidence shows that the company had two "propmen" assigned to each longwall, whose primary function was to clean the longwall shields. In addition, the operator had not previously been cited for accumulations on the shields. Thus, while I find that the Respondent was highly negligent with regard to this violation, I do not find that its negligence rises to the level of reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care.

Accordingly, I conclude that this violation was not the result of the operator's unwarrantable failure to comply with the regulation. The citation will be modified to a 104(a) citation, 30 U.S.C. § 814(a).

Order No. 4768528

This order alleges a violation of section 75.400 because:

Accumulations of dry float coal dust deposited on rock-dusted surfaces was permitted to accumulate in the #2 and #3 return air entries of the 102 Longwall working section.

The accumulations began just outby crosscut #22 and extended outby to crosscut #1 in both entries including the crosscuts for a distance of 3,000 feet. Methane in both entries ranged between 0.2-0.4 per centum through the entire distance.

This area was traveled by the weekly examiner on 03/18/04 and the float coal dust was noted in the record book countersigned by the mine foreman.

Other violations for this same condition have been issued to the operator. One was issued on 2/28/04 that included 3,900 feet in the #2 and #3 entries of the 102 Longwall.

At crosscut #9 there w[ere] 2 wooden pallets and a cardboard box up next to the stopping.

Numerous discussions have been held with mine management concerning rock dusting and clean-up on the shields.

The condition noted by the weekly examiner was corrected on day shift on 03/18/04 by two miners. The area was rock dusted. Seven production shifts occurred after the area was dusted. Approximately 56 passes by the shear w[ere] mined at about 1,500 tons per pass or 84,000 tons. Due to the dryness of the coal and more float dust being generated, more attention to the condition of the return entries should have been made by management.

(Govt. Ex. 11.)

After writing the citation for the shields, Inspector Gibson proceeded to the tailgate of the longwall, to the number 2 and 3 return air entries. He testified that “the area was black with float coal dust.” (Tr. 114.) He related that there was a check curtain across the number 3 entry, directing air into the number 2 entry. He said that he went through the curtain into the number 3 entry and started heading outby. He said both the number 2 and 3 entries were black with float coal dust, the “worst” that he had seen. (Tr. 115.) He said the float coal dust was dry and continued through both entries to crosscut number 1. He testified that it was thick enough that he left palm prints on the ribs and footprints on the floor. (Tr. 115.) The inspector further testified that he observed two wooden pallets and a cardboard box, also combustible materials, next to the stopping in crosscut number 9. (Tr. 154.)

Similar to its argument with regard to the previous citation, the company does not deny the existence of the accumulations, but asserts that since the area had been rock dusted on March 18, four days earlier, it should not be cited for accumulations without a showing that the rock dusted accumulations did not meet the requirements of section 75.403, 30 C.F.R. § 75.403.⁶ This argument would be more persuasive if section 75.400 did not specifically require the cleaning up

⁶ Section 75.403 calls for rock dusted areas in return entries to have an incombustible content of 80 percent.

of accumulations of “float coal dust deposited on rock-dusted surfaces.” Plainly, float coal dust deposited on rock-dusted surfaces is dangerous whether or not the rock-dusted surface below it is incombustible.

Here float coal dust was deposited on rock-dusted surfaces to such an extent that they were black. According to Inspector Gibson this was observable right at the tailgate and got worse down the entries. The deposits were deep enough to leave hand and foot prints. Therefore, I conclude that the company violated section 75.400 as alleged.

Significant and Substantial

Inspector Gibson charged this violation as being “significant and substantial.” He based this determination on the amounts of float coal dust and the fact that it was very dry so that “[a]ny forces going through there would only pick the float dust up and contribute to any forces of an explosion.” (Tr. 117.) He also considered the presence of methane in the mine. (Tr. 118.) He further testified that, in addition to the propensity for the float coal dust to exacerbate an existing fire or explosion, the dust could be ignited by “[t]he shearing machine itself, the electrical cables along the face, the lights, under normal mining conditions there’s going to be dust generated and again the potential of as evidenced the metal against metal cutting bits contacting the sprags or hard rock.” (Tr. 117-18.)

Continuing its argument made concerning the fact of violation, the Respondent contends that the Secretary’s failure to show whether or not the rock-dusted surfaces were incombustible precludes a finding that the violation was S&S. As previously noted, this contention is at odds with the specific recognition in 75.400 that float coal dust on rock-dusted surfaces is hazardous.

Considering this violation under the *Mathies* criteria, I have already found criterion 1, a violation of a mandatory safety standard, section 75.400. I further find: (2) that the accumulation contributed to the safety hazard of a fire or explosion; (3) that there was a reasonable likelihood that a fire or explosion would occur, resulting in an injury; and (4) that the resulting injury or injuries would be serious. I make these findings for the same reasons I made them concerning the previous citation. Accordingly, I find that the violation is “significant and substantial.”

Unwarrantable Failure

Inspector Gibson found this violation to result from the company’s unwarrantable failure to comply with the regulation. He testified that one reason he made this finding was that the operator had been cited on February 18, 2004, for accumulations of float coal dust in the numbers 2 and 3 entries, from crosscuts 20 through 33. (Tr. 122, Govt. Ex. 7.) He related further that:

The violation was extensive, it was 3,900 feet in length.
And some of the crosscuts that I was dealing with on March 22
overlapped at least two of the crosscuts that [Inspector Vetter] dealt

with on February 18. So their awareness was already elevated, I mean it should have been, it should have been elevated, hey, we do have a problem and it should have been recognized knowing that the winter alert you're in that season, the mine's more drier, the coal's more drier. And I really felt that they should have been – had a higher degree of care displayed than what was displayed.

(Tr. 122-23.)

The Respondent maintains that since it was rock dusting in the numbers 2 and 3 entries, “at least rock dusting as much as it thought adequate,” it did not act unwarrantably. (Resp. Br. at 41.) However, rock dusting is not at issue in this violation, accumulations are.

With regard to unwarrantable failure, the following factors are significant: (1) The operator was cited for float coal dust accumulations in the same entries on February 18, 2004, (Govt. Ex. 7); (2) A weekly examination report for March 15 noted the need to rock dust the returns from crosscut 24 through crosscut 8, (Govt. Ex. 1); (3) A March 18 construction report stated that the returns had been rock dusted from crosscut “19 to ?”, (Govt. Ex. 4); (4) By March 22, the area at the tailgate of the longwall at the numbers 2 and 3 return air entries was black with float coal dust, (Tr. 114); (5) The mine had been going through rough conditions with the top, which was “real brittlely and falling in,” and floor for the last couple of breaks, (Tr. 288-89); (6) When coal on the longwall face is dry, it is not unusual for the bottoms of the return air entries to become dark or even black over the course of several days, (Tr. 350).

By March 22, the operator had previously been cited for float coal dust accumulations in the numbers 2 and 3 return entries and it had been alerted a week earlier that the entries needed more rock dusting than they were getting. The longwall supervisors were aware that the area in which they were currently mining was producing more coal particles and float coal dust than normal. The area of the numbers 2 and 3 entries right at the tailgate was black with float coal dust. All of this should have put the operator on notice that float coal dust was accumulating in the return entries at a pace that required greater attention than waiting until the next weekly examination before taking any action to resolve the problem. Instead, the company did nothing different than it would have done when mining in “normal” conditions.

I conclude that the Respondent acted with indifference and a serious lack of reasonable care with regard to this violation. Therefore, I find that the operator unwarrantably failed to comply with the regulation.

Citation No. 4768527 was the predicate citation for this order. In view of the fact that Citation No. 4768527 is being modified to a 104(a) citation, it can no longer serve as the predicate for Order No. 4768528. Accordingly, Order No. 4768528 will be modified from a 104(d)(1) order to a 104(d)(1) citation. *Consolidation Coal Co.*, 4 FMSHRC 1791, 1794 (Oct. 1982).

Civil Penalty Assessment

The Secretary has proposed a penalty of \$13,524.00 for these three violations.⁷ However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996).

In connection with the penalty criteria, the parties have stipulated that San Juan Coal is a large company, the San Juan South Mine is a large mine and that payment of the penalty in this case will not affect San Juan's ability to continue in business. (Tr. 11-13.) From the Assessed Violation History Report and other documents in the file, I find that the company has a slightly better than average history of violations. I further find that the Respondent demonstrated good faith in attempting to rapidly abate the violations.

I find the gravity of Citation Nos. 4768527 and 4768528 to be very serious as there is nothing more dangerous in underground coal mining than fires and explosions. The gravity of Citation No. 7605679 is serious, but not as serious as the other two because it involves levels of incombustibility. I further find that the level of negligence with regard to Citation Nos. 4768527 and 4768528 was "high" and that the level of negligence for Citation No. 7605679 was "moderate."

Taking all of these factors into consideration, I conclude that the following penalties are appropriate: (1) Citation No. 4768527-\$3,000.00; (2) Citation No. 4768528-\$6,900.00; and (3) Citation No. 7605679-\$324.00.

Order

In view of the above, Citation No. 4768527 is **MODIFIED** from a 104(d)(1) citation to a 104(a) citation by deleting the "unwarrantable failure" designation and is **AFFIRMED** as modified; Order No. 4768528 is **MODIFIED** from a 104(d)(1) order to a 104(d)(1) citation and is **AFFIRMED** as modified; and Citation No. 7605679 is **AFFIRMED**. San Juan Coal Company is **ORDERED TO PAY** a civil penalty of **\$10,224.00** within 30 days of the date of this order.

T. Todd Hodgdon
Administrative Law Judge

⁷ The penalties are proposed as follows: (1) Citation No. 4768527-\$6,300.00; (2) Order No. 4768528-\$6,900.00; and (3) Citation No. 7605679-\$324.00.

Distribution:

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